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DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 307 and 381

[Docket No. FSIS - 2011-0032]

RIN: 0583-AD48

Additional Changes to the Schedule of Operations Regulations

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is amending the meat and poultry product regulations pertaining to the schedule of operations. FSIS is amending these regulations to define the 8-hour workday as including time that inspection program personnel need to prepare the inspection station, if necessary, or retrieve and return lot tally sheets; the time necessary for FSIS inspection program personnel to sharpen knives, if necessary; and the time necessary to conduct duties scheduled by FSIS, including administrative activities. The activities are integral and indispensable to inspectors' work and are part of the continuous workday as defined by the Fair Labor Standards Act. Therefore, they are activities that need to be part of the Agency's regulatory definition for the 8-hour workday.

DATES: Effective [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Rachel Edelstein, Acting Assistant Administrator, Office of Policy and Program Development, FSIS, U.S. Department of Agriculture, 1400 Independence Avenue SW, Washington, DC 20250-3700, telephone: (202) 205-0495.

SUPPLEMENTARY INFORMATION:

Background

The Federal Meat Inspection Act (FMIA), 21 U.S.C. 601 et seq., and the Poultry Products Inspection Act (PPIA), 21 U.S.C. 451 et seq., provide for mandatory Federal inspection of livestock and poultry slaughtered at official establishments and of meat and poultry products processed at official establishments. FSIS bears the cost of mandatory inspection provided during non-overtime and non-holiday hours of operation. Official establishments pay for inspection services performed on holidays or on overtime.

On March 19, 2012, FSIS proposed to amend its regulations pertaining to the schedule of operations (77 FR 15976). FSIS proposed to amend these regulations to define the 8-hour workday as including time that inspection program personnel need to prepare the inspection station at meat slaughter establishments, if necessary, or to retrieve and return lot

tally sheets at poultry slaughter establishments; the time necessary for FSIS inspection program personnel to sharpen knives, if necessary, at meat slaughter establishments; and the time necessary to conduct duties scheduled by FSIS, including administrative activities at meat and poultry slaughter establishments. The activities are integral and indispensable to the principal work of inspection program personnel as defined in 29 CFR 790.8, "Principal" activities. Therefore, these activities need to be part of the Agency's regulatory definition for the 8-hour workday.

Response to comments

FSIS received one comment within the scope of the rulemaking regarding the proposed rule change from an association representing the meat industry. The comment raised the following issues:

De minimis

The commenter stated that FSIS has ignored the Office of Personnel Management (OPM) regulation 5 CFR 551.412(a) that governs the exclusion of de minimis actions from compensable activities. The commenter stated that the OPM rule excludes preparatory activities that last less than 10 minutes and also stated that the proposed rule identified two of three activities specified in the proposal - administrative activities and preparation for inspection - as each taking

less than 10 minutes per day. Therefore, the commenter asserted that the OPM regulation precludes the need for the proposed rule.

Response

As stated in the proposed rule, FSIS considers these activities as integral and indispensable to the principal work of inspection program personnel as defined in 29 CFR 790.8, "Principal" activities. As integral and indispensable work activities under the Fair Labor Standards Act, FSIS finds that these activities should be included as part of the continuous workday when reading both 5 CFR 551.412(a) and the OPM definition of "workday" at 5 CFR 551.411(a), together. 5 CFR 551.412(a) cannot be properly read alone to exclude time spent on indispensable work activities during the continuous workday from compensable hours of work. Any duties scheduled by FSIS, including administrative duties, are integral and indispensable to the essential work of inspection program personnel because they enable inspection program personnel to carry out their work effectively. The preparation of the workstation is an integral and indispensable activity ensuring that inspectors have the necessary stamps used to identify condemned parts while conducting their inspection duties. Therefore, administrative duties and the preparation of the work station in cattle slaughter establishments are integral

and indispensable to the principal work of inspection program personnel as defined in 29 CFR 790.8, "Principal" activities, and thus, these activities need to be part of the Agency's regulatory definition for the 8-hour workday.

Knife sharpening

The commenter did not dispute that knife sharpening is a compensable activity but did oppose the standardized approach in the proposed rule that would give inspectors one 15-minute period for knife sharpening if they perform on-line duties in a cattle slaughter establishment 3 days or less per week or if they perform on-line duties in a swine slaughter establishment, and two 15-minute periods for knife sharpening if they perform on-line duties in a cattle slaughter establishment 4 or more days per week. The commenter stated that plants should be permitted to conduct individualized assessments of the time it takes inspectors to sharpen their knives.

Response

The time estimates FSIS developed in the proposed rule for knife sharpening were based on an Agency CD-ROM training video, "Knife-Safety and Sharpening Skills," and the numbers of times per week for knife sharpening were based on a variety of factors, including the species being inspected (i.e., cattle or swine) and the number of carcasses inspected. The

time allocations that FSIS is finalizing are necessary to ensure the safe and proper use of knives during inspection. The Agency cannot ensure the safety of its inspectors and that proper knife sharpening occurs if each establishment determines for itself how long it should take inspectors to sharpen a knife because each establishment will have a financial incentive to reduce this amount of time. Therefore, when FSIS implements this rule, it will ensure inspection program personnel have an appropriate amount of time to sharpen their knives.

Inaccurate inspector time records

The commenter stated that because inspectors bill in 15-minute increments, all slaughter facilities already pay inspectors for time during which inspection work is not being done. The commenter stated that a facility should be permitted to review inspectors' time records and offer corrections supported by reports and stamped surveillance footage, if necessary, before inspectors submit their time records. The commenter also stated that during interruptions for line stoppages or equipment failures, inspectors should make use of the time that they are not on the line for activities such as knife sharpening. The commenter also stated that if inspectors choose not to use such time, establishments should not have to pay overtime for the activity.

Response

FSIS supervisors assign work to inspection program personnel. FSIS will ensure that its supervisory personnel instruct inspection program personnel to complete the activities addressed in this final rule during any time remaining in a 15-minute increment of overtime or during work times when they are not on the line. However, FSIS does not agree that establishments should implement a formal monitoring program, such as video surveillance of FSIS employees or checking inspector time sheets. FSIS supervisors ensure that employees accurately record the time that they work. Establishment management should discuss any concerns about the time worked by FSIS inspectors with FSIS supervisors.

Line Time

Lastly, the commenter stated that any additional time inspectors need to be compensated for under the proposed rule should not count against the 10-hour-per-day limit of actual inspector time permitted by FSIS.

Response

FSIS ensures that the maximum time an employee may work on the slaughter line is ten (10) hours per work day. While knife sharpening, station preparation, and administrative duties are integral to the work and conducted during the continuous workday, they are activities not done on the

slaughter line itself. Therefore, these activities are not subject to the 10 hour per day limit of slaughter line activity.

Amendment to 9 CFR 307.4(c) and 381.37(c)

After consideration of the comments received and for the reasons discussed above, FSIS is adopting the proposed rule as a final without revision and is amending the meat regulations to provide that the 8 hours of inspection service provided to establishments free of charge will include activities necessary to fully carry out an inspection program, including time for inspection program personnel to prepare the work station; the time necessary for FSIS inspection program personnel to sharpen knives, if necessary; and the time necessary to conduct duties scheduled by FSIS, including administrative duties. When the rule goes into effect, FSIS will direct its supervisory personnel at livestock slaughter establishments to conduct a new time measurement that measures the amount of time it takes to don required gear, walk to a work station, prepare the work station, and doff required gear. If establishments do not provide a knife sharpening service, the establishment will also need to incorporate the times and frequencies discussed above in response to comments on knife sharpening into the 8 hours of

inspection or request that knife sharpening be done in an overtime period.

FSIS is amending the poultry products regulations to provide that the 8 hours of inspection service provided to establishments free of charge will include activities necessary to fully carry out an inspection program, including time for inspection program personnel to retrieve and return lot tally sheets and the time necessary to conduct duties scheduled by FSIS, including administrative duties. Inspection program personnel in poultry products establishments do not use knives when conducting inspection activities and do not need to prepare the work station. When this rule goes into effect, FSIS will direct its supervisory personnel in poultry slaughter establishments to conduct a new time measurement that measures the amount of time it takes inspection program personnel to don required gear, pick up a lot tally sheet, and doff required gear.

In addition, when this rule goes into effect, slaughter establishments will need to provide inspection program personnel 1 minute every day to complete time and attendance activities.

As with the provisions for donning, doffing, and the associated walk time, establishments will need to either incorporate the time for inspection program personnel

performing on-line inspection duties to conduct knife sharpening, to complete the time and attendance reporting, and to prepare for inspection into their hours of operation or request overtime charges. The regulations provide that FSIS will bill overtime in 15-minute increments (9 CFR 307.6 and 381.39). Therefore, in situations where establishments have requested overtime, FSIS, when possible, will instruct inspection program personnel performing on-line inspection duties to do the activities addressed in this rule during any time that remains within 15-minutes of requested overtime.

Executive Order 12866 and the Regulatory Flexibility Act

This rule has been designated non-significant under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget.

Cost to the Industry

Under this final rule, the most direct cost to the industry will be the overtime fee that the Agency will need to charge slaughter establishments for the time inspection program personnel spend in three groups of activities: (1) sharpening knives, (2) completing administrative activities, and (3) preparing for inspection. As we explained in the cost analysis of the Final Rule on Changes to the Schedule of Operations Regulations (76 FR page 33979), if meat and poultry

slaughter establishments want to maintain their normal shift length of operating for 8 hours, they would incur some overtime fees.¹ Although the choice is voluntary, the Agency expects that most meat and poultry slaughter establishments will choose to maintain their current shift-time, as shortening the shift-time will decrease production and revenue while idling existing capacity. However, FSIS does not expect the overtime fee from these three groups of activities to be significant because (1) the establishments have options, as we will discuss later, besides paying overtime for some of these activities, and (2) the time for carrying out administrative activities and preparing for inspection (including preparing an inspection station and picking up and dropping off lot tally sheets) is small -one minute or two per day- and will probably not push the overtime over the 15-minute threshold to incur more over-time charge than are currently assessed for donning and doffing activities.

Similar to donning and doffing, the actual time FSIS inspection program personnel will take to perform these activities will vary in each meat and poultry slaughter establishment depending on plant-specific variables. FSIS developed estimates on the amount of time it takes for

¹ This regulatory change should not impact the schedule of operations for meat and poultry processing establishments and egg product plants because those establishments can begin operations without FSIS inspection program personnel being at an on-line inspection work station.

inspection program personnel to perform these activities and requested public comments. FSIS did not receive any comments on the estimates, so FSIS's estimates remain the same in this final rule.

Knife-sharpening:

- a. Two 15-minute periods per week for inspection program personnel who perform on-line inspection duties in beef slaughter operations for 4 or more days per week
- b. One 15-minute period per week for inspection program personnel on the beef slaughter line for 3 days or less per week or in a swine slaughter establishment
- One minute per day to complete administrative activities
- Two minutes or less for preparing for inspection

Agency personnel data² show that there are 3,053 inspection program personnel performing on-line inspection duties in poultry and meat slaughter establishments - 2,037 in poultry, 1,000 in meat, and 16 in establishments that slaughter both meat and poultry. Data from an Agency survey³ indicates that among the meat slaughtering inspectors, 56 percent work in beef establishments that operate 4 or 5 days

² As of November 2011.

³ Survey date is March 2011.

per week, 4 percent work in beef establishments that operate less than 4 days per week, 36 percent work in swine establishments, and 4 percent work in lamb, sheep, and goat establishments. Because lamb, sheep, and goat establishments are small or very small establishments, inspection program personnel would be able to complete the activities addressed in this final rule within the 8-hour day, and, therefore, there are no related cost calculations for these establishments in this final rule. Applying the percentages to the total of 1,016 meat slaughter inspectors⁴, we have 573 inspection program personnel working in beef establishments that operate 4 or 5 days per week, and 409 working in either beef establishments that operate less than 4 days per week or swine establishments. The overtime fee that the Agency charges for each 15-minute interval is \$17.08 for FY 2012. Multiplying this number by the Agency-estimated knife-sharpening time, we estimated the annual cost for knife sharpening time to be about \$1,776.3 (\$17.08 per quarter-hour x 2 knife-sharpening periods per week x 52 weeks per year) per inspection program personnel in beef slaughter establishments that operate 4 days or more a week, and \$888.2 (\$17.08 per quarter-hour x 52 weeks per year) per inspection program

⁴ We count the inspection program personnel in combined meat and poultry as meat inspectors so not to underestimate the cost, as poultry slaughter inspectors do not currently have to sharpen knives.

personnel in beef slaughter establishments that operate 3 days or less or in swine establishments. If the industry had to pay all the meat slaughter inspectors to sharpen their knives, the total cost to the industry would be about \$1.38 million $(\$1776.3 \times 573) + (\$888.2 \times 409)$. However, the actual impact would be much less because the industry can offer knife-sharpening services to Agency inspection program personnel instead of paying overtime for it.

If an establishment provides a knife-sharpening service, FSIS will instruct inspection program personnel to use that service. An Agency query⁵ found that the majority of the meat-slaughter establishments are offering knife sharpening to their employees, and about 91% of those also offer the service to Agency inspection program personnel. We expect that many other establishments will start offering the service to avoid paying overtime charges when this rule becomes effective.

As for the other two groups of activities, the time they take is minimal. According to the Agency's estimates mentioned above, these activities combined will be at most 3 minutes per day. In addition, FSIS will permit the establishment to take on the responsibility of preparing the inspection station for inspection program personnel in livestock slaughter establishments. Given that the Agency

⁵ OFO conducted the query in November 2011.

charges overtime in 15-minute increments, and that it believes the donning, doffing, and walking time to be usually less than 15-minutes, time for these additional activities can be absorbed in the overtime period for donning, doffing, and walking time in most cases, thus not causing any additional overtime. In the unlikely, worst-case scenario where these activities push the daily overtime beyond the first 15-minute interval, the establishments would pay each inspection program personnel another \$4,441 (\$17.08 per inspector x 5 days per week x 52 weeks per year) annually. However, the Agency believes this scenario would apply to only a very small percentage of the inspection program personnel.

Comparing the cost to the annual revenue of the meat slaughtering industry alone, which is about \$67.2 billion,⁶ the costs of this rule to the industry will not be significant.

Cost to the consumer

The industry is likely to pass the increased costs on to consumers because of the inelastic nature of the consumer demand for meat and poultry products. However, given that the total volume of meat and poultry slaughtered under Federal

⁶ Summary of the Animal (except Poultry) Slaughtering Industry in the U.S. and its International Trade [2010 edition,] Supplier Relations US, LLC. [http://www.htrends.com/report-2700858-Animal except Poultry Slaughtering Industry in the U S and its International Trade Edition.html](http://www.htrends.com/report-2700858-Animal%20except%20Poultry%20Slaughtering%20Industry%20in%20the%20U%20S%20and%20its%20International%20Trade%20Edition.html), as of 11/16/2011.

inspection in 2010 was about 92 billion pounds,⁷ the increased cost per pound due to the overtime fee will be less than \$0.0001 on average.

Benefits of the rule

This final rule will include integral and indispensable work activities (as defined by the Fair Labor Standards Act) into the defined inspector "workday." Therefore, this rule will help ensure compliance with the law and the improved use of Agency resources.

Regulatory Flexibility Analysis

The FSIS Administrator has made a determination that this final rule will not have a significant impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601). There are 263 small and 566 very small meat and poultry slaughter establishments (by Small Business Administration standard). In small and very small establishments, inspection program personnel typically have adequate time during their tour of duty to sharpen their knives as well as conduct the other activities under this final rule, because they do not have to be on-line for 8 hours. Therefore, the impact will not be significant.

Paperwork Reduction Act

⁷ *Livestock, Dairy, & Poultry Outlook/LDP-M-209/November 16, 2011; Economic Research Service, USDA.*

This final rule has been reviewed under the Paperwork Reduction Act and imposes no new paperwork or recordkeeping requirements.

USDA Nondiscrimination Statement

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Additional Public Notification

FSIS will announce this final rule online through the FSIS Web page located at:
[http://www.fsis.usda.gov/regulations_&_policies/Federal Register Notices/index.asp](http://www.fsis.usda.gov/regulations_&_policies/Federal_Register_Notices/index.asp).

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List of Subjects

9 CFR Part 307

Government employees, Meat inspection

9 CFR Part 381

Government employees, Poultry products inspection

For the reasons discussed in the preamble, FSIS is amending 9 CFR Chapter III as follows:

PART 307--FACILITIES FOR INSPECTION

1. The authority citation for part 307 continues to read as follows:

Authority: 7 U.S.C. 394; 21 U.S.C. 601-695; 7 CFR 2.17, 2.55.

2. In § 307.4(c), remove the second sentence and add two sentences in its place to read as follows:

§ 307.4 Schedule of operations.

* * * * *

(c) * * * The basic workweek shall consist of 5 consecutive 8-hour days within the administrative workweek Sunday through Saturday, except that, when possible, the Department shall schedule the basic workweek so as to consist of 5 consecutive 8-hour days Monday through Friday. The 8-hour day excludes the lunch period but shall include activities deemed necessary by the Agency to fully carry out an inspection program, including the time for FSIS inspection program personnel to put on required gear and to walk to a work station; to prepare the work station; to return from a work station and remove required gear; to sharpen knives, if necessary; and to conduct

duties scheduled by FSIS, including administrative duties.* *

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PART 381 - POULTRY PRODUCTS INSPECTION REGULATIONS

3. The authority citation for part 381 continues to read as follows:

Authority: 7 U.S.C. 138f, 450; 21 U.S.C. 451-470; 7 CFR 2.7, 2.18, 2.53.

4. In § 381.37(c), remove the second sentence and add two sentences in its place to read as follows:

§ 381.37 Schedule of operations.

* * * * *

(c) * * * The basic workweek shall consist of 5 consecutive 8-hour days within the administrative workweek Sunday through Saturday, except that, when possible, the Department shall schedule the basic workweek so as to consist of 5 consecutive 8-hour days Monday through Friday. The 8-hour day excludes the lunch period but shall include activities deemed necessary by the Agency to fully carry out an inspection program, including the time for FSIS inspection program personnel to put on required gear, pick up required forms and walk to a work station; and the time for FSIS inspection program personnel to return from a work station, drop off

required forms, and remove required gear; and to conduct
duties scheduled by FSIS, including administrative duties. *

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Done at Washington, DC, on: September 21, 2012

Alfred V. Almanza,

Administrator.

[FR Doc. 2012-23682 Filed 09/26/2012 at 8:45 am; Publication
Date: 09/27/2012]